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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3405WMJC

Evelyn Susan Hafley,	*	
	*	
Appellee,	*	Order Denying Petition for
	*	Rehearing and Suggestion
vs.	*	for Rehearing En Banc
	*	
Janette Lohman, etc., et al.,	*	
	*	
	*	
Appellants.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 3, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 95-3405

Evelyn Susan Hafley,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Western District of Missouri.
Janette Lohman, Director,	*	
Department of Revenue,	*	
State of Missouri; James	*	
Callis, Director, Department of	*	
Revenue, State of Missouri,	*	
Dean Powell, Assistant	*	
Administrator, Field Services	*	
Bureau, Department of Revenue,	*	
State of Missouri; Rich Lamb,	*	
Administrator, Field Services	*	
Bureau, Department of Revenue,	*	
State of Missouri; Raymond	*	
Hune, Director, Division of	*	
Motor Vehicle, Department of	*	
Revenue, State of Missouri;	*	
William Siedhoff, formerly,	*	
Director, Division of Motor	*	
Vehicle and Driver's Licensing,	*	
Department of Revenue, State of	*	
Missouri State of Missouri;	*	
Mary Ann Reuter, formerly,	*	
Field Services, Manager,	*	
Department of Revenue, State of	*	
Missouri; Lynn Bexten,	*	

Personnel Officer, Department of Revenue, State of Missouri; Zoe Lyle, Deputy Division Director, Motor Vehicle and Driver's Licensing, Department of Revenue, State of Missouri; Ellie James, formerly, Administrator, Field Services Bureau, Department of Revenue, State of Missouri; William H. Melcher, formerly, Deputy Director and Acting Director, Department of Revenue, State of Missouri,

Appellants.

Submitted: April 12, 1996

Filed: July 19, 1996

Before McMILLIAN, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

The sole issue in this case is whether the eleven defendants, current or former employees of the state of Missouri, are entitled to qualified immunity. The District

Court[1] denied the defendants' motion to dismiss the complaint on the basis of qualified immunity, and we affirm.

Evelyn Susan Hafley is an administrative coordinator with the field services bureau of the Missouri Department of Revenue. In her complaint, Hafley alleges that defendant Eillie James instructed her "to hide a file containing information about the Department of Revenue's University City Fee Office" and "to say nothing about said file." Complaint at ¶ 9. Hafley alleges that she refused to do as instructed because she believed that hiding the file would have been illegal. She then reported the incident to defendant Dean Powell, who allegedly told her to follow Jame's instructions and "stay out of it." Complaint at ¶ 11. Hafley also alleges that she reported the instructions she had received from James and Powell to defendants Rich Lamb and Mary Ann Reuter. She alleges that the defendants thereafter retaliated against her in a variety of ways for her attempts to report the actions of James and Powell and for her refusal to hide the file, which later allegedly was seized in a criminal investigation of the University City fee office. She alleges that the defendants took these actions "to punish Plaintiff for refusing to commit an illegal act and exercising her First Amendment rights," specifically the "right to exercise freedom of speech." Complaint at ¶¶ 16-17. The defendants have not filed an answer to the complaint. Instead, the defendants moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

The District Court denied the motion to dismiss and the subsequent motion to reconsider "because there is insufficient evidence for the Court to weigh the applicability of defendants' assertion of qualified immunity . . . . Plaintiff

---

[1] The Honorable Fernando J. Gaitan Jr., United States District Judge for the Western District of Missouri.

is required to put defendants on notice by the filing of her complaint. This she has done." Hafley v. Lohman, No. 95-4078-CV-C-2, order at 1 (W.D. Mo. Sept. 7, 1995) (denying motion to reconsider order denying motion to dismiss) (citations omitted).

"The denial of a defendant's motion to dismiss on the grounds of qualified immunity, although interlocutory in nature, is a final appealable order within the meaning of 28 U.S.C. § 1291." Weaver v. Clarke, 45 F.3d 1253, 1255 (8th Cir. 1995). We review de novo a district court's order denying a motion to dismiss, viewing the allegations in the complaint in the light most favorable to the plaintiff. Id. We note that "qualified immunity is an affirmative defense," and "it will be upheld on a 12(b)(6) motion only when the immunity is established on the face of the complaint." Id. The defendants in this case are entitled to qualified immunity unless Hafley has alleged the violation of a constitutional right that was clearly established at the time of the alleged violation. Id. Like the District Court, we must accept the allegations of the complaint as true when considering a Rule 12(b)(6) motion to dismiss. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). "[D]ismissal is inappropriate 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" McCormack v. Citibank, N.A., 979 F.2d 643, 646 (8th Cir. 1992) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

The defendants first contend that Hafley's complaint does not meet the heightened pleading standard that this Court has applied to "[c]omplaints seeking damages against government officials," Edgington v. Missouri Dep't of Corrections, 52 F.3d 777, 779 (8th Cir. 1995). They also contend that the Complaint fails to set forth specific acts committed by defendants Lohman, Callis, Hune, Siedhoff,

Bexten, Lyle, and Melcher. Those issues, however, are not properly before us. While an interlocutory order that decides the issue of qualified immunity may be final and appealable under § 1291, a denial of a motion to dismiss for failure to state a claim is not a final appealable order. See United States v. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 275-76 (1988) (noting that denial of motion to dismiss is not appealable unless it fits within "a 'small class' of decisions that are appealable . . . even though they do not terminate the underlying litigations"). Thus we lack jurisdiction to consider the defendants' arguments regarding the sufficiency of the allegations in the complaint.

The defendants also contend that Hafley's complaint fails to allege that the defendants violated a constitutional right that was clearly established at the time of the alleged violation, thus showing that the defendants are entitled to qualified immunity on the face of the complaint. We disagree. We reiterate that we must accept the allegations in the complaint as true and construe all reasonable inferences therefrom in favor of Hafley at this early stage in the litigation. See McCormack, 979 F.2d at 646. In essence, Hafley alleges that she has been retaliated against for speaking to her supervisors about a matter of public concern, specifically an attempt to hide government records from an impending criminal investigation of the handling of public funds by the Missouri Department of Revenue at its University City fee office. At the time, it was clearly established that such retaliation could have violated the First Amendment. See, e.g., Pickering v. Board of Educ., 391 U.S. 563, 574 (1968) ("statements by public officials on matters of public concern must be accorded First Amendment protection"); ("We generally have held that speech about the use of public funds touches upon a matter of public concern."), cert. denied, 116 S. Ct. 1565 (1996). In Dunn v. Carroll, 40 F.3d 287 (8th Cir. 1994), this Court stated that

> [a] disciplinary action against a public employee violates his First Amendment rights if: (1) the conduct for which he was punished can be "fairly characterized as constituting speech on a matter of public concern," Connick v. Myers, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983); and (2) the interest of the employee in commenting on the matter of public concern outweighs the public employer's interest in promoting its efficiency by prohibiting the conduct. Pickering v. Board of Educ., 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968).

Id. at 291. Whether the protected speech is actually communicated to the public is irrelevant. See Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 415-16 (1979) ("Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."); Cox v. Dardanelle Pub. Sch. Dist., 790 F.2d 668, 674 (8th Cir. 1986). The defendants' argument that the allegations in the complaint fail to state a claim under Pickering is specious. Under Pickering, courts must balance "the interest of the [public employee] as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568. Construing the allegations and all reasonable inferences therefrom in favor of Hafley, it is clear that her interest in exposing an attempt to obstruct a criminal investigation into the handling of public funds outweighs the state's interest in the efficiency of its public services. The Pickering balance

understandably favors the plaintiff when the test is based solely on the allegations in the complaint.

The defendants argue that the allegations in the complaint can be construed differently, that is, in a way such that Hafley's speech appears to be related only to internal department policies. Such an argument is irrelevant, as we must construe the complaint in the light most favorable to Hafley. The defendants also asserted at oral argument that the allegations are baseless. Hafley may indeed fail to prove her allegations at trial, but that is irrelevant to the consideration of the defendants' Rule 12(b) (6) motion to dismiss. Moreover, the defendants ultimately may establish that they are entitled to qualified immunity, but we agree with the District Court that they have not done so yet.

For the reasons stated, the order of the District Court denying the defendants' motion to dismiss on the basis of qualified immunity is affirmed.

A true copy.

Attest:

CLERK, U. S. DISTRICT COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Evelyn Susan Hafley,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 95-4078-CV-C-2
	)	
Janette M. Lohman, et al.,	)	
	)	
Defendants.	)	

ORDER

Defendants' motion to reconsider is denied. Defendants' motion to dismiss is denied because there is insufficient evidence for the Court to weigh the applicability of defendants' assertion of qualified immunity. Foulks v. Cole County, Mo., 991 F.2d 454, 456 (8th Cir. 1991). Plaintiff is required to put defendants on notice by the filing of her complaint. This she has done. The Court does not find that Brown v. Frey, 889 F.2d 159, 170 (8th Cir. 1989) or the other cases cited by defendants require plaintiff to do any more than she has at this stage of the litigation.

Defendants are given seven days from the date of this order to respond to plaintiff's complaint.

Fernando J. Gaitan, Jr.
United States District Judge

Dated: September 7, 1995
Kansas City, Missouri

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Evelyn Susan Hafley,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 95-4078-CV-C-2
	)	
Janette M. Lohman, et al.,	)	
	)	
Defendants.	)	

ORDER

Defendants' motion to dismiss is hereby denied. The parties are to submit a joint proposed scheduling order on or before August 21, 1995.

Fernando J. Gaitan, Jr.
United States District Judge

Dated: August 7, 1995
Kansas City, Missouri

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

EVELYN SUSAN HAFLEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cause No. _____
	)	
JANETTE M. LOHMAN, Director, Department of Revenue, State of Missouri,	)	JURY TRIAL DEMANDED
	)	
and,	)	
	)	
JAMES CALLIS, Deputy Director, Department of Revenue, State of Missouri,	)	
	)	
and,	)	
	)	
DEAN POWELL, formerly, Assistant Administrator, Field Services Bureau, Department of Revenue, State of Missouri,	)	
	)	
and,	)	
	)	
RICH LAMB, Administrator, Field Services Bureau, Department of Revenue, State of Missouri,	)	
	)	
and,	)	
	)	
RAYMOND HUNE, Director, Division of Motor Vehicle, Department of Revenue, State of Missouri,	)	
	)	
and,	)	
	)	
WILLIAM SIEDHOFF, formerly,	)	

Director, Division of Motor Vehicle)
and Driver's Licensing,)
Department of Revenue,)
State of Missouri,)
)
and,)
)
MARY ANN REUTER, formerly, Field)
Services, Manager, Department of)
Revenue, State of Missouri,)
)
and,)
)
LYNN BEXTEN, Personnel Officer,)
Department of Revenue,)
State of Missouri,)
)
and,)
)
ZOE LYLE, formerly, Deputy Division)
Director Motor Vehicle and Driver's)
Licensing, Department of Revenue,)
State of Missouri,)
)
and,)
)
ELLIE JAMES, formerly Administrator)
Field Services Bureau, Department of)
Revenue, State of Missouri,)
)
and,)
)
WILLIAM H. MELCHER,)
formerly, Deputy Director and)
Acting Director, Department of)
Revenue, State of Missouri,)
)
Defendants.)
)
SERVE DEFENDANTS, LOHMAN,)
BEXTEN, CALLIS, POWELL, LAMB,)
HUNE, and REUTER AT:)
Missouri Department of Revenue)
301 W. High Street)

Jefferson City, Missouri 65101)
)
SERVE DEFENDANT JAMES AT:)
2553 Haber)
St. Louis, Missouri 63136)
)
SERVE DEFENDANT SIEDHOFF AT:)
202 St. Louis Avenue)
Fulton, Missouri 65251)
)
SERVE DEFENDANT LYLE AT:)
2037 Wendemere Court)
Jefferson City, Missouri 65101)
)
SERVE DEFENDANT MELCHER AT:)
2227 Melin Drive)
Jefferson City, Missouri 65101)

COMPLAINT

COMES NOW, Plaintiff, Evelyn Susan Hafley, by and through her undersigned counsel, and as and for her Complaint against Defendants, and each of them, states and alleges as follows:

PRELIMINARY STATEMENT

1. That Plaintiff, Evelyn Susan Hafley, brings this action, and demands trial by jury on all issues which may be submitted to a jury, under 42 U.S.C. Sec. 1983, and the First and Fourteenth Amendments to the United States Constitution, namely, the right to exercise freedom of speech guaranteed under the First Amendment, for legal, equitable and declaratory relief to redress the injuries done to her and the deprivation of rights, privileges and immunities as aforesaid.

JURISDICTION AND VENUE

2. That the jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1343 (4), 28 U.S.C. Sec. 1331, and 42 U.S.C. Sec. 1983.

3. That at all times relevant to this Complaint, Defendants, and each of them, acted under color and pretense of law, to wit: color of statutes, ordinances, regulations, customs, and usages of the State of Missouri and Department of Revenue.

4. That at all times relevant to this Complaint, Defendants engaged in the illegal conduct herein mentioned to the injury of Plaintiff, and deprived Plaintiff of her rights, privileges and immunities secured to her by the First and Fourteenth Amendments to the Constitution of the United States and the laws of the Unites States of America and the State of Missouri.

PARTIES

5. That Plaintiff is, and was at all times relevant and material to this action, a citizen of the United States of America and State of Missouri residing in the County of Cole, State of Missouri.

6. That Plaintiff is, and was at all times relevant and material to this action, employed by the State of Missouri as Administrative Coordinator, Field Services Bureau, Department of Revenue.

7. That at all times relevant and material to this action, the Department of Revenue was an Executive Department authorized and existing under the laws of the State of Missouri.

8. That at all times relevant and material herein, Defendants Callis, Powell, Lamb, Hune, Siedhoff, Reuter, Bexten, Lyle and James were subject to the supervision of and policies promulgated by, Defendants Melcher and Lohman in the Department of Revenue, State of Missouri; and, further, Defendant Melcher was subject to the supervision of, and policies promulgated by Defendant Lohman in the Department of Revenue, State of Missouri.

FACTS

9. That on or about March 2, 1993, Plaintiff was told by Defendant, Ellie James to hide a file containing information about the Department of Revenue's University City Fee Office, and further told by Defendant, James to say nothing about said file.

10. That thereafter Plaintiff advised Defendant, James that Plaintiff would not either hide said file or agree to say nothing about it as such acts were illegal; Plaintiff, further, asked said Defendant, James if legal counsel from the Department of Revenue, State of Missouri was to attend an investigatory interview with said Defendant, James.

11. That thereafter Plaintiff reported the actions and instructions of Defendant, James as aforesaid to Defendant, Powell who told Plaintiff to, "do as [Defendant,] James had told her to do with said file" and "stay out of it".

12. That thereafter, notwithstanding the instructions of Defendants, Powell and James as aforesaid, and for reason that said instruction, if performed by Plaintiff would have constituted illegal conduct, Plaintiff refused to hide said file, and Plaintiff advised Defendants Lamb and

Reuter of the illegal instructions of defendants James and Powell.

13. That in or about March of 1993, a criminal investigation was instituted regarding practices at the Department's University City Fee Office, and the said file Plaintiff was instructed to hide was seized; and, all file cabinets int he Field Services Bureau, Department of Revenue, State of Missouri were locked and taped shut.

14. That upon information and belief, in or about June of 1993 Defendant, James was terminated from employment with the Department of Revenue by Defendant, Lohman for Defendant, James' involvement with the Department's University City Fee Office.

15. That since March of 1993, when Plaintiff refused to commit the illegal act of hiding said file and reported the illegal instructions of Defendant, James as aforesaid, Defendants, and each of them, individually and in concert, have retaliated against Plaintiff because of her refusal to commit the illegal conduct and for her exercise of First Amendment rights, such retaliation including, but not being limited to, verbal harassment of Plaintiff at home while she was recovering from appendicitis, assigning Plaintiff menial tasks, not allowing Plaintiff to perform duties in her job description, denying Plaintiff promotional transfers, refusing to give Plaintiff timely performance appraisals as required, negatively evaluating Plaintiff's performance and issuing to her a warning letter without cause, denying Plaintiff education reimbursement, denying Plaintiff attendance at training seminars, and denying Plaintiff overtime compensation, same being for the purpose of forcing Plaintiff to resign and to constructively discharge Plaintiff.

16. That all of the acts by the Defendants, and each of them, were done to punish Plaintiff for refusing to commit an illegal act and exercising her First Amendment rights.

17. That the acts done by the Defendants, and each of them, violated Plaintiff's right to exercise freedom of speech as guaranteed her by the Constitution of the United States of America.

18. That the acts done by the Defendants, and each of them, were in excess of any authority to grant them by law, and were without justification and in excess of any authority granted them by law, and were without justification or excuse in law.

19. That Defendants, and each of them, acted in concert and without authorization of law, willfully, knowingly and purposely, with the specific intent of depriving Plaintiff of her First Amendment rights.

20. That the acts of the Defendants did, in fact, deny Plaintiff her First Amendment rights as those rights are secured to Plaintiff by the provisions of the due process clause of the Fourteenth Amendment to the Constitution of the United States and by 42 U.S.C. Sec. 1983 and the statutes and laws of the State of Missouri.

21. That as a result of the acts of Defendants, and each of them, Plaintiff has incurred, and will continue to incur, medically significant emotional distress, humiliation, embarrassment and damage to her reputation, lost job advancement and opportunity for promotion, monetary losses, attorney's fees and costs in connection with this action.

22. That Plaintiff has no plain and adequate remedy at law.

WHEREFORE, Plaintiff, Evelyn Susan Hafley, prays this Court to enter judgment in her favor, awarding her just compensation for damages sustained as a result of lost job advancement and promotional opportunity, expunging Plaintiffs negative performance appraisals and warning letter, preliminary and permanent injunction staying Defendants from further acts of retaliation against Plaintiff and requiring that she be accorded fair and equal treatment, Plaintiff's compensatory and punitive damages and reasonable attorney's fees; taxing the costs of this action against Defendants and for such further and additional relief as this Court may deem just and proper under the circumstances.

FUENTES & VASQUEZ, P.C.

By: Lloyd J. Vasquez, Jr. (MBE #31336)
Three Flags Center
1354 South Fifth Street
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(314) 947-4070 (Phone)
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Columbia, Missouri 65102
(314) 874-3100 (Phone)
(314) 874-3200 (Fax)
Attorneys for Plaintiff,
Evelyn Susan Hafley

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 32.057.

Confidentiality of tax returns and department records - exceptions - penalty for violation. - 1. Except as otherwise specifically provided by law, it shall be unlawful for the director of revenue, any officer, employee, agent or deputy or former director, officer, employee, agent or deputy of the department of revenue, any person engaged or retained by the department of revenue on an independent contract basis, any person to whom authorized or unauthorized disclosure is made by the department of revenue, or any person who lawfully or unlawfully inspects any report or return filed with the department of revenue or to whom a copy, an abstract or a portion of any report or return is furnished by the department of revenue to make known in any manner, to permit the inspection or use of or to divulge to anyone any information relative to any such report or return, any information obtained by an investigation conducted by the department in discharge of official duty, or any information received by the director in cooperation with the United States or other states in the enforcement of the revenue laws of this state. Such confidential information is limited to information received by the department in connection with the administration of the tax laws of this state.